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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 832 65

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY; DELAWARE & HUDSON RAILROAD CORPORATION; DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; SCOTT M. LOFTIN and JOHN W. MARTIN, as Trustees of the Florida East Coast Railway Company; PENNSYLVANIA RAILROAD COMPANY; and WABASH RAILROAD COMPANY,

Petitioners,

vs.

ACME FAST FREIGHT, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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ACME FAST FREIGHT, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the other petitioners herein respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This action was originally brought by the respondent, Acme Fast Freight, Inc., in the United States District Court for the Southern District of New York, for a declara-

tory judgment with respect to Section 1013 of Part IV of the Interstate Commerce Act; enacted May 16, 1942 (56 Stat. 295; Title 49, U. S. C. A., Section 1013).

Part IV of the Interstate Commerce Act (49 U. S. C. A. Sections 1001 to 1022) regulates freight forwarders. Basically, the controversy herein is whether, on forwarder traffic transported in part by rail carriers, that portion of the movement effected by rail carriers is governed by the bill of lading issued by the initial rail carrier to the forwarder or by a bill of lading previously issued by the forwarder to its shipper. By a declaratory judgment respondent seeks to avoid the application to it, as shipper, of the claim provision of the rail carriers' bill of lading.

In its action respondent, a forwarder, asks that Section 1013 (set forth in full at p. 17 *infra*) be construed by the Court as declaring that on shipments which it originates (and on which respondent issues its own bills of lading to its own customers) it is the "receiving" (initial) carrier within the intendment of Section 20 (11) and 20 (12) of Part I of the Interstate Commerce Act (Carmack Amendment, set forth at R. 122, 49 U. S. C. A. Sec. 20(11) and 20(12)); that it is also "receiving carrier" within the meaning of the uniform bill of lading which it issues to its customers for each individual package shipment received by it, which individual package shipments it subsequently consolidates and delivers to petitioning rail carriers and for which it receives a second bill of lading issued to it by such rail carriers. Under the Carmack Amendment and under the terms of the uniform bill of lading which it issues as aforesaid, respondent alleges that the filing of claims for loss or damage with it by its shippers is a compliance with the claim clause in its bill of lading so as to enable it, upon payment of such claims, to recover over against the rail carrier on whose line the loss or damage occurred without compliance by it with the claim clause in the subsequent bill of lading issued to it by the first rail carrier receiving the consolidated carload shipment (R. 7).

Respondent's claim of alleged right of recovery over against the rail carriers is based on the claim that it is subrogated to the rights of its shippers against the rail carriers by virtue of the alleged incorporation of the provisions of the Carmack Amendment into the Forwarder Act by the provisions of Section 1013 of that Act (R. 7).

Although the claim clauses in the bill of lading which respondent issues and in the bill of lading subsequently issued to respondent by the first rail carrier are identical (clause set forth at R. 129), instances have occurred where respondent's shipper has filed claim with it within the nine months' period provided for in respondent's bill of lading but in which respondent has failed to file claims against the rail carriers within the nine months' period provided for by the rail carriers' bill of lading (R. 6).

Respondent further sought a declaration that it is not required to file claim with the railroad carriers within the period provided by the railroad uniform bill of lading in such circumstances, but is subrogated to the claims of its shippers as filed with it so that it may recover from the railroads for any claim paid by it to a shipper for loss or damage occurring during rail transportation (R. 7).

The respondent is a freight forwarder subject to Part IV of the Interstate Commerce Act, commonly known as the Freight Forwarder Act (49 U. S. C. A., Secs. 1001 to 1022). The petitioners are rail carriers subject to Part I of the Interstate Commerce Act. (49 U. S. C. A., Secs. 1 et seq.)

The respondent as freight forwarder assembles and consolidates package shipments—known as "less than carload" shipments—into carload shipments, which consolidated carloads are shipped by the respondent as shipper consigned to itself as consignee, at some central or other distribution point selected by the respondent (R. 31). The shipments which respondent assembles are those of numerous shippers consigned to various consignees at numerous destinations (R. 33, 34). Respondent charges its individ-

ual shippers a rate or charge which is usually less than such shipper would be charged by petitioners if the shipment were delivered to the railroad directly and handled as a less than carload shipment. After consolidation of numerous shipments into carload shipment or shipments, the respondent tenders the consolidated shipments to the petitioners as carload shipments only, to be transported at the rail carriers' carload rate to a designated rail destination (R. 33, 35, 36). The rail destination need not be the actual destination of any of the packages in the carload and if it is not the respondent will arrange for the handling beyond by the same or other forms of transportation (R. 74).

The *raison d'etre* of a forwarder such as the respondent is the profit to be made from the difference between the rate charged to the individual package shippers and the carload rate charged to the forwarder as shipper by the petitioners for the consolidated shipment. Through the loss of identity of the individual package shipments, due to the amalgamation of the shipments, owned by several shippers, into a consolidated carload to be shipped in the name of the forwarder as shipper and consignee, the forwarder is, as to the rail carriers, a shipper, while as to the package owner or shipper it may be a transportation agency.

There is no dispute as to the manner in which the respondent conducts its business as forwarder. It is admitted that the respondent performs no part of the actual transportation. The respondent is not in fact a carrier and Part IV does not designate or characterize the respondent as a carrier. If the respondent is not a carrier, the claim clause of the railroad uniform bill of lading cannot be avoided by it except by preferential or discriminatory treatment prohibited under both Part IV (Sec. 1004 (c)) and Part I (Secs. 2 and 3) of the Act.

The respondent moved for summary judgment against petitioners Wabash Railroad Company, Delaware, Lacka-

wanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company (R. 54); and also moved to strike out the affirmative defenses contained in the answers of all the petitioners (R. 72; R. 78). The petitioners Delaware, Lackwanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company cross-moved for judgment on the pleadings (R. 71). By stipulation the cross motion was amended to include all petitioners herein as moving parties and further amended to include therein a motion for summary judgment on behalf of all the petitioners herein (R. 81, 82).

The District Court denied respondent's motions (R. 107), and directed summary judgment for the petitioners on the ground that the respondent was not a carrier but merely a forwarder; that as forwarder it was subject to Part IV only of the Act; that carriers by rail were subject to Part I only, and not Part IV of the Act; and that as to the rail carriers the respondent was a shipper and therefore required to comply with the claim clause of the rail carriers' bill of lading issued to respondent on its carload shipments (R. 83-102). The Circuit Court of Appeals, Second Circuit, reversed the judgment of the District Court in an opinion in which it held that the respondent was obviously not a carrier, but also held that for the limited purpose of Section 1013 the respondent might be considered a carrier, and that, as such, it was an initial carrier, so that filing of a claim with the respondent by any one of the respondent's shippers would satisfy the claim clause of the respondent's bill of lading, and enable respondent, by subrogation, to recover against the rail carrier at fault without complying with the claim clause in the rail carrier's bill of lading (R. 119-129).

The judgment of the District Court was entered on July 10, 1947, and the opinion of the Circuit Court of Appeals reversing the judgment was handed down on March 1, 1948, and judgment entered on the same date (R. 119, 131).

B.

Specification of Errors

The Circuit Court of Appeals for the Second Circuit erred:

1. In reversing the judgment awarded in favor of the petitioners dismissing the complaint on the merits.

2. In failing to affirm the judgment below.

3. In failing to hold that the respondent is bound by the terms of the bill of lading issued to it by the rail carriers for the transportation of the consolidated carload shipment in all respects, including the requirement that claims be filed in the manner and time therein specified.

4. In holding that the respondent never has been and was never intended by Congress to become a carrier, and at the same time holding that the respondent was an initial carrier.

5. In failing to hold that the respondent was not an initial carrier as to the shipments transported by the rail carriers but was a shipper only, as to such shipments, subject to the rail carriers' carload rates and bills of lading.

6. In holding that the petitioners are bound, in the transportation of the carload shipments received from the respondent, by the terms of the bills of lading issued by the respondent to its individual package shippers, on each package shipment subsequently consolidated into such carload shipments.

7. In holding that the doctrine of *M. K. & T. Ry. Co. v. Ward*, 244 U. S. 383, and similar cases is applicable to the factual situation in this case so as to render void the bill of lading issued to respondent forwarder by the rail carriers.

8. In failing to hold that the bills of lading issued by respondent to its customers for the individual package shipments are not through bills of lading and that the petitioners are not parties thereto.

9. In holding that on forwarder traffic, as involved in this case, the rail carriers are connecting carriers only.

10. In failing to hold that the rail bill of lading issued to respondent forwarder has the effect of limiting any right of recourse or of subrogation, if such right is granted to respondent under Section 1013 of the Interstate Commerce Act, so as to obligate respondent to comply with the claim clause in such bill of lading.

C.

Reasons Relied on for the Allowance of the Writ

The questions involved are all Federal questions arising under the Interstate Commerce Act and are questions of law only.

The principal reasons for the allowance of the writ are:

1. The judgment of the Circuit Court of Appeals, if permitted to stand, makes the respondent freight forwarder a carrier so as to avoid the bill of lading issued by the initial rail carrier on respondent's carload rail shipments transported by petitioners and as to which the respondent is and always has been considered the shipper. Such a construction of the effect of Section 1013 of Part IV of the Interstate Commerce Act is a decision construing a federal statute and deciding a federal question of substance not heretofore determined by this Court.

2. The decision of the Circuit Court of Appeals adversely affects every rail carrier in the United States, is

national in scope and is a decision with respect to the Interstate Commerce Act which constitutes a precedent of general application.

3. The decision of the Circuit Court of Appeals flies squarely in the face of what appears to have been the legislative intent of the Congress in the enactment of Part IV of the Interstate Commerce Act.

4. The decision of the Circuit Court of Appeals in effect exempts the respondent from the application of the uniform bill of lading prescribed by the Interstate Commerce Commission for use by rail carriers and is in conflict with the weight of authority of decisions construing and applying the provisions of Part I of the Act which are applicable to the respondent as shipper of rail carload shipments.

5. The effect of the decision of the Circuit Court of Appeals voiding the bill of lading issued to freight forwarders on carload shipments tendered to rail carriers by freight forwarders is to allow to freight forwarders a preference as against ordinary shippers tendering carload shipments to rail carriers under like conditions. Such preferential treatment is contrary to the intent of Congress in enacting the Forwarders Act and inconsistent with other provisions of said Act and of the entire Interstate Commerce Act.

6. The Circuit Court of Appeals has decided an important question of law which has not been, but should be considered by this Court. It has construed the provisions of a Federal statute in such a way as to establish a dangerous, fallacious precedent inimical to the best interests of the nation's transportation system if permitted to stand; and which adversely affects the orderly administration of the transportation system of the country.

7. The Circuit Court of Appeals by its decision in this case decided an important question of general law in a way possibly untenable or in conflict with the weight of authority and more particularly in connection with the distinction between a carrier and a forwarder.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the Second Circuit, that said judgment be reversed and the judgment of the District Court reinstated and the respondent's complaint dismissed, and that your petitioners may have such other and further relief in the premises as may be just and proper.

Dated, New York, N. Y., May 28, 1948.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,
DELAWARE & HUDSON RAILROAD CORPORATION,
DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
SCOTT M. LOFTIN and JOHN W. MARTIN, as Trustees of the Florida East Coast Railway Company,
PENNSYLVANIA RAILROAD COMPANY, and
WABASH RAILROAD COMPANY,

Petitioners.

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Petitioners,

vs.

ACME FAST FREIGHT, INC.,

Respondent.

BRIEF FOR PETITIONERS

I. Opinions Below

The opinion of the United States District Court for the Southern District of New York was rendered on June 3, 1947 (R. 83-107) and is not reported.

The opinion of the United States Circuit Court of Appeals was rendered on March 1, 1948 (R. 119-129) and is reported in 166 Fed. (2d) 778.

II—Jurisdiction

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered March 1, 1948 (R. 131). The jurisdiction of this Court is invoked under U. S. Code, Title 28, Sec. 347(a).

III—Statement of the Case

Respondent is a freight forwarder subject to Part IV of the Interstate Commerce Act (R. 73). As such, it receives from various shippers individual package or less-than-carload or less-than-truckload shipments and issues bills of lading therefor (R. 31, 32). It causes the individual shipments to be trucked to concentration points where it consolidates them into carload lots (R. 32). It then tenders the consolidated carload lots to a rail carrier for transportation by such rail carrier and its connecting rail carriers to a destination on the line of such rail carrier or its connecting rail carriers. The tender is made by respondent *as a shipper* (R. 32, 33). It is described as shipper in the rail bill of lading and also as consignee, and the consolidated shipment is uniformly described in the rail bill of lading as "one carload mixed merchandise" (R. 33). The railroad accepts the shipment for transportation as a carload shipment and issues its bill of lading therefor as such; and charges the carload rate (R. 33, 35).

The rail bill of lading is a different contract from the bill of lading previously issued by the forwarder to its shipper, although the printed terms and conditions may be the same. The bills of lading show different shippers, different consignees, different points of origin, different destinations, different shipments, different rates and different routes (R. 33, 34). At the time of the tender to the rail carrier the individual shipments for each of which a bill of lading has previously been issued by the forwarder have lost their identity by reason of the consolidation hereinabove referred to and have become merged into the single carload shipment tendered to the rail carriers for transportation on a single new bill of lading. At the rail destination the carload shipment is delivered to respondent and receipted for as a single shipment, is then broken up by respondent into its various component parts and such

parts are caused to be transported by respondent by truck and delivered to the consignee named in respondent's bill of lading, or perhaps further transported by rail in a newly assembled carload lot on a new rail bill of lading (R. 35).

Respondent files its tariffs with the Interstate Commerce Commission pursuant to Part IV of the Interstate Commerce Act (R. 32), and the rail carriers file their tariffs with the Commission pursuant to Part I of said Act (R. 36). The rail carriers are not permitted to have joint rates with the forwarders and do not receive from respondent any portion of the freight charges which it charges its shipper. Likewise, the forwarder cannot be a party to the rail carrier's tariff structure and receives no portion of the freight charges collected by the rail carriers (R. 32, 37). Such freight charges are assessed against the forwarder and paid by it for its own account (R. 35, 36). The forwarder's profit comes from the difference between the charges it collects from its shippers on the package shipments and the low carload charges which it pays to the railroads.

The theory of the complaint is that with respect to the individual package shipments upon which it issues bills of lading to its shippers, the forwarder is, by virtue of § 1013 of the Interstate Commerce Act, the initial carrier and the rail carriers simply connecting carriers; that under the doctrine of *M. K. & T. Railroad Company* v. *Ward*, 244 U. S. 383, the bill of lading issued by the forwarder to its shipper for the package shipment received by it governs also the transportation by the rail carriers of the consolidated carload shipment subsequently delivered by the forwarder to the rail carriers; that the bill of lading issued by the initial rail carrier for the consolidated carload shipment is therefore void; that if a loss occurs on the lines of any one of the rail carriers, the forwarder is liable therefor under the Carmack Amend-

ment (Interstate Commerce Act, § 20(11)); that upon payment of such loss the forwarder is, under § 20(12) of the Interstate Commerce Act, subrogated to the rights of its shipper against the rail carrier; that compliance by its shipper with the claim clause in the forwarder's bill of lading enables its shipper to recover against any of the rail carriers upon the theory that the terms and conditions of transportation over the lines of the rail carriers are governed by the terms of the forwarder's bill of lading; and that the forwarder, being thus subrogated, can recover against the rail carriers without compliance with the terms of the rail carrier's bill of lading. This theory was rejected by the District Court but its decision was reversed by the Court below.

Effect of Application of Respondent's Theory. It being an integral part of respondent's theory that the rail bill of lading issued by the initial rail carrier for the carload shipment received by it is void, the effect of the application of this theory is not simply to enable the plaintiff to escape the claim clause in the rail bill of lading. It also has the effect of varying in numerous respects the responsibility of the rail carrier as to carload shipments tendered to it by forwarders from their responsibility as to carload shipments tendered to them by other shippers under identical conditions. Its effect is to impose upon the rail carriers the greater "less-than-carload" liability for shipments received by the railroad from forwarders as carload shipments and moving under carload rates. On the other hand the railroads, with respect to similar shipments made by shippers other than forwarders, are subject to "carload liability." Numerous clauses in the uniform bill of lading applicable to ordinary shippers, such, for example, as the warehouse clause (Ex. A, Sec. 1(b), R. 42) and the stoppage in transit clause (id., Sec. 1(b)) will not be applicable in respect to forwarder shipments whereas, under like conditions, such clauses might operate to

relieve the carriers from responsibility with respect to shipments tendered by shippers other than forwarders. Liability under the act or default of shipper or owner clause (id., Sec. 1(b)) may be varied. This is because the rail carriers under forwarder traffic become, under respondents' theory, intermediate carriers of the individual package shipments. The liability of an intermediate rail carrier may, in varying circumstances, be quite different from that of a receiving or delivering carrier. Demurrage charges assessable by the delivering rail carrier against the consignee at final rail destination may no longer be assessable on forwarder traffic because, under respondent's theory, the delivering rail carrier is simply an intermediate carrier to the forwarder.

As a result of this, railroad claim agents will be called upon to pay claims presented by forwarders on a quite different basis from claims presented by ordinary shippers of carload lots. In both cases the freight rate is the same, but, under respondents' theory, the measure of responsibility differs.

The disposition of hundreds of thousands of existing or future freight claims is affected in the matter. It will not be denied by respondent that this action was brought against a representative group of rail carriers in order to secure an authoritative decision.

These considerations, as well as the arguments advanced, *infra*, are respectfully urged upon this Court as reasons for granting the writ.

IV. Specification of Errors.

A statement of the specification of errors will be found in the petition for writ of certiorari (*supra*).

V. Summary of the Argument.

I. The Forwarder Act (Interstate Commerce Act, Part IV) has never been passed upon or interpreted by this Court, and the questions presented are of first impression.

II. Prior to the enactment of the Forwarder Act, respondent, as to the railroads whose services it utilized, was a shipper. It was not the intent of Congress that the Act should change such status and the legislation did not in fact effect such a result.

III. The facts and circumstances surrounding the tendering to and receipt by a rail carrier of carload shipments from respondent forwarder preclude the denomination of the rail carrier as a "connecting carrier" and the doctrine of *M. K. & T. Ry. Co.* v. *Ward* and similar cases is not applicable.

IV. Even if respondent be deemed "initial carrier" as to a railroad and to have a right-over under Section 20(12), such right-over is regulated, modified and limited by agreement, *i. e.*, Section 2(b) of the bill of lading issued to respondent.

V. The writ of certiorari sought in the annexed petition should be granted.

POINT I

The Forwarder Act (Interstate Commerce Act, Part IV) has never been passed upon or interpreted by this court, and the questions presented are of first impression.

The court below interpreted § 1013 of Part IV of the Interstate Commerce Act in such a manner as necessarily to bring about the results heretofore mentioned. It is

claimed (Point II, *infra*) that this interpretation produces a result contrary to the intent of Congress as shown by other provisions of the Forwarder Act, with which it is not in harmony; and also a result out of harmony with the fundamental scheme of the entire Interstate Commerce Act. Determination of the question, therefore, involves an examination of all the provisions of the recently enacted Forwarder Act, the legislative history of the Act, the state of the law and the status of forwarders prior to its enactment, and a comparison of certain sections of Part IV with like sections of other parts. As far as research shows, no question involving interpretation of the Forwarder Act has been decided by this Court. It is submitted that in the interest of orderly administration of the entire Act, and the orderly conduct of the country's transportation system a final decision by this Court on these questions is of importance.

POINT II

Prior to the enactment of the Forwarder Act, respondent, as to the railroads whose services it utilized, was a shipper. It was not the intent of Congress that the Act should change such status and the legislation did not in fact effect such a result.

Prior to the enactment of the Forwarder Act (Part IV, Interstate Commerce Act, 49 U. S. C. A. 1001, *et seq.*), the forwarder had the status of a shipper when using railroad common carrier transportation services. As such shipper, it was subject to all the published classifications and tariffs of the railroad, the terms of the railroad bill of lading issued to it, and the railroads were prohibited from giving the forwarder a preference in transportation or discriminating against it.

Freight Forwarder Investigation, 229 I. C. C. 201, 297;

I. C. C. v. *D. L. & W. R. R. Co.*, 220 U. S. 235;
L. V. R. R. Co. v. *U. S.*, 243 U. S. 444;
Cf, as to forwarder and motor carrier, *Acme Fast Freight, Inc.* v. *U. S.*, 30 Fed. Supp. 968, aff'd 309 U. S. 638.

In instances where the forwarder's shipper sued the underlying rail carrier, such shipper was held to be bound by the bill of lading issued by the rail carrier to the forwarder, its agent.

Great Northern Ry. Co. v. *O'Connor*, 232 U. S. 508.

A modern forwarder secures traffic from many points not reached by the rail carrier, and when it assembles and consolidates such shipments for transportation as rail carrier shipments, it frequently has control of traffic which competing rail carriers and also long-haul motor carriers are anxious to secure. A Commission investigation brought to light various instances in which forwarders were taking advantage of their control of traffic to secure preferential treatment from regulated rail and motor carriers (*Freight Forwarder Investigation*, 229 I. C. C. 201, 304). This very respondent had even gone so far as to establish joint rates with motor carriers, which the Commission had held to have been filed in violation of the Act. The Commission's cancellation of these rates was sustained by this Court in *Acme Fast Freight, Inc.* v. *U. S.*, 30 Fed. Supp. 968, aff'd 309 U. S. 638, upon the authority of *Lehigh Valley R. Co.* v. *U. S. Interstate Commerce Commission* v. *D. L. & W. R. R. Co.*, and *Great Northern Railway Co.* v. *O'Connor, supra.* The lower court in that case rejected the contention that as to actual carriage of goods the forwarder was anything more than a shipper.

The Commission's investigation of forwarders revealed the necessity of legislation on the subject, and in 1942 there was enacted the Forwarder Act which became Part IV of

the Interstate Commerce Act (49 U. S. C. A. 1001, *et seq.*). A resumé of the provisions is found in the opinion of the District Court herein (R. 94, 95). That Congress had in mind unsound practices of forwarders looking to receive preferential treatment from common carriers and wished to prohibit the same is clear from § 1004 by which it is made unlawful for any carrier subject to Parts I, II and III to make, give or cause any undue or unreasonable advantage to any freight forwarder. In view of the provisions prohibiting discriminations and preferences in the Elkins Act, and similar provisions in Parts II and III, § 1004 may have been unnecessary, so that its insertion emphasizes legislative thought in the matter.

The provision of Part IV relied upon by respondent as giving it the right of subrogation against rail carriers and having the effect of voiding the rail carriers' uniform bill of lading is § 1013, which reads as follows:

> "§ 1013. *Bills of lading and delivery of property.* The provisions of section 20(11) and (12) of this title, together with such other provisions of chapter 1 of this title (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to freight forwarders, in the case of service subject to this chapter, with like force and effect as in the case of those persons to which such provisions are specifically applicable, and the freight forwarder shall be deemed both the receiving and delivering transportation company for the purposes of such section 20(11) and (12). When the services of a common carrier by motor vehicle subject to chapter 8 of this title are utilized by a freight forwarder for the receiving of property from a consignor in service subject to this chapter, such carrier may, with the consent of the freight forwarder, execute the bill of lading or shipping receipt for the freight forwarder. When the services of a common

carrier by motor vehicle subject to chapter 8 of this title are utilized by a freight forwarder for the delivery of property to the consignee named in the freight forwarder's bill of lading, shipping receipt, or freight bill, the property may, with the consent of the freight forwarder, be delivered on the freight bill and receipted for on the delivery receipt, of the freight forwarder. Feb. 4, 1887, c. 104, Part IV, § 413, as added May 16, 1942, c. 318, § 1, 56 Stat. 295."

Respondent relies solely on this section, claiming that it incorporates the Carmack Amendment (§ 20 (11) and (12) of Part I) into Part IV so as to change the status of a forwarder from that of a shipper to an initial carrier and so as to make the rail carriers simply connecting carriers, prohibited as such from issuing bills of lading to forwarders on carload shipments of the same character as may be tendered by ordinary shippers, and thus effecting the preferential results referred to *supra*.

That the section does not have such effect appears from its own terms: The provision of Sections 20(11) and (12) of Part I only apply with respect to freight forwarders "in the case of service subject to this chapter." The service subject to Part IV, as an examination of other provisions of the part show, is the service of forwarding. It is *not* the service of carriage by rail, for that is regulated under Part I of the Act.

In other words, the Carmack Amendment was simply made applicable to contractual arrangements between one forwarder and one or more other forwarders. An illustration is that of joint loading arrangements which are permitted among forwarders in the transportation between assembling and distribution points (49 U. S. C. A. 1004(d). Cf. *General Carloading Co., Inc.: Freight Forwarder Application*, 260 I. C. C. 345, illustrating such an

arrangement). On such joint carload the railroad issues only one bill of lading with one of the forwarders described as shipper. In the event of damage to the other forwarder's shipment and payment of claim, such forwarder should have the right-over for recovery against the forwarder to which the bill of lading was issued which alone could maintain an action against the railroad responsible.

That the phrase, "in the case of service subject to this chapter," was intended by Congress to limit the application of §§ 20(11) and (12) is indicated by the remarks of Representative Wolverton, a member of the House Committee and later of the Conference Committee, who delivered on the floor of the House the authoritative exposition of the bill. He said: "The reference to paragraph (12) of § 20 was included in § 413 [now U. S. C. A. § 1013] to cover a combination of services performed directly for the owner of the goods, such as would occur where the services of two or more forwarders were involved" (Cong. Rec., Vol. 87, Part VIII, p. 8220). Representative Wolverton also stated that "if damage to a shipment occurs on the line of a common carrier whose services are being utilized by a forwarder, the forwarder has no right to subrogation under § 20(12) * * *" (*id.*).

The District Court was impressed with this compelling argument and held that § 1013 confines the application of § 20(11) and (12) to the "case of service subject to this chapter", and contemplates nothing further (R. p. 96).

The Court below, however, completely ignored the point, one of the principal contentions of the carriers, and held "that when Congress said in § 1013 that, for the purposes of § 20(11) and (12), a 'freight forwarder shall be deemed both the receiving and delivering transporation company', it meant that for the limited purposes of that section a forwarder is to be treated as a carrier" (R. 124).

In this the Court below clearly erred. As a matter of fact, the denomination of a forwarder as a "transportation company" in § 1013, considered in the light of the language of the Carmack Amendment itself, indicates that Congress was taking special care *not* to designate a forwarder as a receiving or delivering "carrier". Both paragraphs (11) and (12) of § 20 of the Interstate Commerce Act (Carmack Amendment) are applicable to any "common carrier, railroad, or transportation company subject to the provisions of this chapter." Consequently, when, in § 1013, Congress confined itself to denominating a forwarder as a "transportation company" with reference to the Carmack Amendment, it obviously intended to exclude the denomination of a forwarder as a "common carrier" or as a "railroad". The court below, therefore, clearly erred, both in ignoring a principal argument of the petitioners and in adopting a construction which, when analyzed, should favor petitioners rather than respondent.

Bearing in mind that the effect of respondent's interpretation of § 1013 is to change the relationship between forwarder and rail carrier from that of shipper and carrier, which existed at the time of the passage of the Act, so as to constitute the forwarder initial carrier and the rail carrier intermediate connecting carriers, it may be noted that such an interpretation is entirely inconsistent with other provisions of the Forwarder Act and contrary to the intent of Congress as shown by the legislative history.

(a) A freight forwarder is defined in Part IV as follows (49 U. S. C. A. 1002 (5)):

> "The term 'freight forwarder' means any person which (otherwise than as a carrier subject to Chapter 1, 8, or 12 of this title) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compen-

sation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapter 1, 8, or 12 of this title."

Note that, while the forwarder (A) "assembles", (B) "assumes responsibility" and (C) "*utilizes* * * * the services of a carrier", it does not itself "carry". It is not a "carrier". What it does is, in the language of the section, "otherwise than as a carrier".

(b) By Section 1009 the forwarder was authorized to continue for a time the existing joint rate arrangements with motor carriers subject to Part II of the Interstate Commerce Act pending establishment of assembling and distribution rates.* By amendments this period of time was extended until, by amendment of February 20, 1946, authorization for continuance of the joint rate and division arrangements between forwarder and motor carrier was granted without restriction as to expiration date, subject to the authority of the Commission.**

But nowhere in Part IV (Forwarder Act) or in Part I (Railroads) is authority granted by Congress for the forwarder and a railroad to enter into joint or through rate

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* For explanation of the reason for this provision, see 87 Cong. Rec., Part VIII, pp. 8218-19.

** For explanation of this amendment, see House Report No. 1516; HR 2764; 79th Cong., Second Session.

or through route arrangements. In the absence of such authority, it is prohibited (*Acme Fast Freight, Inc.* v. *U. S.*, 30 Fed. Sup. 968, at 973; aff. 309 U. S. 638). And the prohibition indicates an intent to preserve the shipper-carrier status.

(c) No authority is found in either Part I or Part IV for a railroad to give undue or unreasonable preference or advantage to a forwarder, either in rates or practices. On the contrary, as previously noted, Section 1004(c) specifically prohibits any such preference or advantage, and in so doing envisages the continuance of the shipper-carrier relationship.

(d) Nowhere in Part IV is a forwarder referred to as a "common carrier" or, even "carrier". As originally enacted, Part IV referred to forwarder as "carrier" in only one place (§ 1017 (b)), and that occurred through an error in drafting. That error was promptly corrected by Congress through an amendment striking the word "carrier" and substituting "freight forwarder". The gist of Senator Reed's explanation of the amendment was that there should be no question but that a forwarder was not to be deemed a common carrier (Cong. Rec., Vol. 88, Part V, p. 6115).

In fact, Congress, in its definition of a forwarder (Sec. 1002(5)) specifically excluded it from the category of a common carrier or carrier:

> "The term 'freight forwarder' means any person which (*otherwise than as a carrier subject to Part I, II or III of this title*) * * *". (Italics supplied.)

Parts I, II and III cover *all common carriers* engaged in interstate commerce (except airplanes which are regulated under a separate Act, 49 U. S. C. A. 401, *et seq.*).

(e) Nowhere in Part IV is there any express word, language or phrase stating that the status of a forwarder as to a railroad whose services it utilizes has been changed from that of shipper. On the contrary the framers of the Forwarder Act had in mind the preservation of the then existing status. (Congressman Youngdahl, on the Forwarder Bill, Oct. 23, 1941—Cong. Rec., Vol. 87, Part 8, p. 8223. Congressman Wolverton in Conference report of May 11, 1942, Cong. Rec., Vol. 88, Part 3, p. 4065.)

Furthermore, Part IV is interpreted by the Interstate Commerce Commission as making no change in the status of a freight forwarder as shipper with respect to the railroads (*J. R. Kelly Freight Forwarder Application*, 260 I. C. C. 315, 321).

(f) The court below erred in its analysis of the legislative history of the Act. In footnote 17 (R. 127) it quotes (with some omission) the report of the House Committee applicable to § 1013 indicating that it was intended to give forwarders a right of subrogation against rail carriers but it fails to give weight to a vitally important correction of the House Committee report made on the floor of Congress by Representative Wolverton in the course of his statement made in the presence of the Chairman and other members of the Committee and with their support, explaining the bill to the House. This was the only detailed explanation of the bill given at any session of Congress.

At the outset of his address, Mr. Wolverton remarked that there were certain inaccuracies in the report which he intended to clarify.* His entire comment on § 1013 (only a

* Mr. Wolverton said: "In some respects the report which accompanies this bill is not as complete as it might be. Due to limitations of time the report was not submitted to the members of the committee or subcommittee, and therefore it may not be out of place to include in these remarks some further explanations which may

(*Footnote continued on following page*)

part of which is quoted by the Court below in its footnote 17) is as follows:

> "In its explanation of section 413 [49 U. S. C. A., § 1013] the report which accompanied the bill is not strictly accurate in interpreting the intended legal effect of making section 20(11) and (12) of part I applicable to freight forwarders. It should be understood that, in so far as a given service to its shipper is covered by the published rate of a freight forwarder, the latter is the only person to which such shipper is entitled to look for recovery of damages, and it is in this sense that the forwarder is to 'be deemed both the receiving and delivering transportation company.' If damage to a shipment occurs on the line of a common carrier whose services are being utilized by the forwarder, the forwarder has no right to subrogation under section 20(12), since its own shipper never had any right of action against such carrier. The forwarder's recovery against the carrier would be upon the bill of lading issued to it by such carrier and under the provisions of law applicable thereto. The reference to paragraph (12) of section 20 was included in section 413 to cover a combination of services performed directly for the owner of the goods, such as would occur where the services of two or more for-

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be helpful to the Members in their consideration of the measure. In a few instances, which will be mentioned later, the report may not be so phrased as to convey fully the sense of what was intended.

"In addition there has come to the attention of the committee certain criticisms of the bill by some of the trucking interests as to which the members would doubtless be interested in knowing the conclusions of the committee. *For these reasons I shall endeavor to clarify the views of the committee in respect of these several matters.* In order, however, that what is said with respect to individual points shall appear in its proper relation to the subject as a whole, I think it will be of interest to the Members of the House if I first briefly sketch the development of forwarding operations in recent years." (Italics ours.) (Cong. Rec., Vol. 87, p. 8216.)

warders were involved." (Cong. Rec., Vol. 87, Part VIII, p. 8220.)*

The District Court agreed with Mr. Wolvertion (R. 98, 100, 101). The Court below thought his premise *i. e.*, that the shipper would have no cause of action against the carrier was in error and, therefore, that his conclusion was unsound (Footnote 17, R. 127).

In this statement the Court below was in error. The forwarder's shipper cannot sue the rail carrier on the forwarder's contract because the rail carrier is not a party to it. The forwarder's shipper cannot sue the rail carriers on the railroad bill of lading because the forwarder's shipper is not a party to it. He is simply the undisclosed principal of the forwarder, his agent as to a component part of the entire carload shipment. The so-called exception to the rule of privity of contract applicable to an undisclosed principal does not apply where the undisclosed principal is merely one of several interested in a single indivisible contract made by the agent in his own name and his interest is not apportioned. In such case neither the principal nor the third person can sue each other;** but even if it

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* In the court below respondent attempted to avoid the effect of Mr. Wolverton's remarks by intimating that he was simply the ranking minority member. However, following Mr. Wolverton's authoritative explanation of the bill, the Chairman of the Committee expressed no disagreement but remarked, as to Mr. Wolverton, that he "gave unstinted work to these problems and with an ability of which every member of the Committee is well aware. I appreciate his good support of this measure today * * *" (87 Cong. Rec., Part VIII, p. 8227).

** *Roosevelt* v. *Doherty*, 129 Mass. 301;
Beckhusen & Gibes v. *Hamblet*, 2 Q. B. D. 18 (1900);
14 Harvard Law Review, 146 (note commenting on above two cases);
H. Midwood's Sons v. *Alaska Portland Packers Ass'n*, 28 R. I. 303; 67 Atl. 61;
2 Mecham on Agency, 2nd Edition, §2060;

(*Footnote continued on following page*)

should be otherwise and held that the forwarder's shipper has a cause of action against the railroad as undisclosed principal, he is still governed by the terms and conditions of the rail bill of lading (*Gt. Northern Ry.* v. *O'Connor*, 232 U. S. 508).

With respect to the right of the forwarder's shipper to sue the carrier *in tort*, the Court below (R. 127) erred in following *New Jersey Steam Navigation Co.* v. *The Merchants Bank*, 6 How. 343, 379-381, a case decided prior to the enactment of the Interstate Commerce Act, the Carmack Amendment and the Elkins Act, and ignoring such cases as *Georgia, Florida and Alabama Railroad* v. *Blish Milling Co.*, 241 U. S. 190, 197, and *American Railway Express* v. *Levee*, 263 U. S. 21. The latter cases abrogate the common law distinction between *tort* and contract in a loss and damage case brought under the Carmack Amendment and hold that the effect of the provisions of the rail bill of lading cannot be escaped by suing *in tort*.

Restatement of the Law of Agency, Vol. 1, § 187 and Vol. 2, § 305.

The carload shipment made by the forwarder and tendered to the carrier as "carload of mixed merchandise" may consist of several hundred individual packages owned by several hundred people. To permit the carrier to be harassed by several hundred suits brought by several hundred undisclosed principals to a single indivisible contract made with the agent would be intolerable and contrary to the doctrine of the cases cited in this note. There have been instances where a forwarder's shipper has sued a carrier and the point made in this footnote has not been raised but even in such cases the forwarder's shipper, the undisclosed principal, has been held to have been bound by the forwarder's contract with the railroad (*Great Northern Ry.* v. *O'Connor*, 232 U. S. 508). The problem of split claims is one involved in this case which should be passed on by this Court.

The Court below's construction of § 1013 is founded upon inconsistent premises. It holds on the one hand that the forwarder is merely agent of an undisclosed principal, its shipper. On the other hand it gives the forwarder the status of initial carrier with right of subrogation.

Finally, the Court below failed to note that Mr. Wolverton's remarks, above quoted, were concerned with "the intended legal effect" of § 1013. So it is that the authoritative legislative spokesman has recited the "intended legal effect" as being one thing, but that the Court below has held it to have been another.

To summarize: Prior to the passage of the Forwarder Act the relationship between forwarder and railroad was that of shipper and carrier, and the forwarder was bound by the terms of the rail carrier's bill of lading. The foregoing paragraphs indicate (1) that the legislative history shows that it was not the intent of Congress in enacting Part IV to change that situation; (2) that there is no language in the Act expressly effecting a change; (3) that the definition of a forwarder negatives a change; (4) that the prohibition against preference and the absence of authority for joint rates or any common arrangement for rates and routes negatives the implication of a change; (5) that the Interstate Commerce Commission has found no change and (6) that § 1013, upon which plaintiff relies, is limited in its application to "the case of service subject to this Chapter,"—*i. e.*, forwarder service—and so does not effect, and was not intended by Congress to effect, a change. Accordingly, the conclusion is inescapable that, as no change has been effected by the Act, the pre-existing relationship between respondent and the rail carriers still obtains. Respondent is still a shipper and petitioners are still not connecting carriers; respondent is still bound by the terms of the rail bill of lading, including the claim clause. The right of action of respondent, and its shipper, if any, against the railroad is governed by the terms of the rail bill of lading issued by the railroad to respondent (*Great Northern Ry. Co.* v. *O'Connor*, *supra*).

The court below conceded that it was not the intent generally of the Forwarder Act to change the status of for-

warder vis-a-vis rail carrier from that of shipper to initial carrier but claimed that there existed an exception to that intent in § 1013 alone (R. 123). In so doing it ignored the fact that the existence of such an exception would have the legal effect of creating in favor of forwarders the very preferences which it was one of the purposes of the Act to obviate. The holding that the carriers' uniform bill of lading is void as to carload shipments made by forwarders but valid as to carload shipments made by others under like circumstances, with resulting divergent measures of carrier responsibility produces absurd, unreasonable and preferential results.

As stated in *U. S. v. Amer. Trucking Ass'ns.*, 310 U. S. 534, at p. 543:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."

It is submitted that the status of a forwarder as shipper as to the railroad long established by the Courts should not be overturned by the Courts and the forwarder declared to be "initial carrier" and "delivering carrier" vis-a-vis the railroad except as a result of legislative enactment definite, clear and explicit in wording, and of an expressed legislative purpose to accomplish such change.

POINT III

The facts and circumstances surrounding the tendering to and receipt by a rail carrier of carload shipments from respondent forwarder preclude the denomination of the rail carrier as a "connecting carrier" and the doctrine of *M. K. & T. Ry. Co.* v. *Ward* and similar cases is not applicable.

The *Ward* case (244 U. S. 383) presents the classic case of a shipment delivered to a rail carrier by a shipper for transportation to a point on the line of another rail carrier. The second rail carrier, although bound to receive the shipment as a connecting carrier, *at the rate* (244 U. S. 387) and upon the terms named in the original bill of lading, forces the shipper to accept a new and second bill of lading covering the *identical* shipment.

Such is not the way in which forwarders and rail carriers do business with each other. In fact they cannot legally do business that way. The forwarder's tariff, filed pursuant to the provisions of Part IV, provides rates for the transportation of individual packages received by it from the point at which they are received from its shipper, for delivery to that shipper's consignee at final destination. The railroad cannot be a party to this rate, nor is it asked to be. The rail carrier does not force upon the forwarder's shipper a new bill of lading for the transportation of the single package shipment previously delivered to the forwarder. On the contrary, upon request of the forwarder, it issues to the forwarder, *not to the forwarder's shipper*, a bill of lading for an entirely different shipment, a carload shipment, which the forwarder tenders to the railroad as shipper, not as a receiving carrier, in which bill of lading the railroad agrees to transport to a rail destination and there to deliver, not to the consignee named in the forwarder's bill of lading, but to the forwarder itself (R. 32, 33). As a matter of fact the railroads do not

even know who the shippers or consignees of the individual package shipments are, nor do they know the description of the contents thereof (R. 75).

By the terms of the Carmack Amendment, carrier liability is predicated on a shipment moving on a "through" bill of lading. A bill of lading issued by the forwarder is not a through bill of lading. Even if it were, the railroads are not a party to it, do not know of its terms and perform no transportation under or pursuant thereto.

In the face of these undisputed facts respondent asks that the actualities of the situation be disregarded and that the doctrine of the *Ward* case be applied to a situation to which it clearly was not intended to apply.

The District Court rejected this contention and was at pains to point out the inapplicability of the *Ward* case (R. 101, 102).

In reversing the District Court, the Court below seemed to feel that it was necessary that the doctrine of the *Ward* case be applied in order to give the forwarder a right of subrogation against the rail carrier. Otherwise, said the Court, Congress might be held to have imposed an insurer's liability upon the forwarder, without corresponding right of recourse against the rail carrier (R. 128).

In this the Court was in error. Prior to the passage of the Forwarder Act, the forwarder, although held to be a shipper in so far as common carriers were concerned (*supra*, p. 15), had been held, by virtue of the nature of its undertaking, to have a common carrier's responsibility with respect to its customers.*

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* Freight Forwarder Investigation, 229 I. C. C. 201, 304. *Kettenhoffen* v. *Globe Transfer & Storage Co.*, 70 Wash. 645; 127 Pac. 295; 42 L. R. A. (N. S. 902 annot.; *Slutzkin* v. *Gerhard & Hey, Inc.*, 199 A. D. 5, 14; *Highway Freight Forwarding Co.* v. *Public Service Com.*, 108 Pa. Sup. Ct. 178, 164 Atl. 835.

In this state of the law Congress, in the Forwarder's Act, defined a forwarder as one who "assumes responsibility for the transportation of such property from the point of receipt to point of destination" (49 U. S. C. A. 1002(5)). Without such assumption a forwarder cannot secure a certificate of convenience.

But the fact that the forwarder assumes, and by definition must assume, through responsibility as a condition precedent to securing permission to do business, does not by any means indicate that any right of indemnity in favor of the forwarder against the rail carrier was necessary or was intended. The forwarder is also defined as one who "utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapter 1 or 8 or 12 of this Title" (49 U. S. C. A. 1002(5)). Utilizing as it does, the services of common carriers by rail as *shipper*, the forwarder has no need of a statutory right of recourse against the rail carrier because it has the contractual right against it under the bill of lading issued by the rail carrier to it, as such shipper.*

That such was the intent of Congress is indicated by the remarks of Mr. Wolverton, above quoted, when after pointing out that under the Act the forwarder has no right to such subrogation he stated: "The forwarder's recovery against the carrier would be upon the bill of lading issued to it by such carrier and under the provisions of law applicable thereto."

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* In this respect the situation between forwarder and rail carriers differs from the situation between the initial rail carrier and connecting rail carriers. The rail carrier issues a bill of lading to the forwarder, upon which the latter can sue. Connecting carriers do not issue bills of lading to the initial rail carrier. Shipments move from carrier to carrier on a waybill. Hence, a statutory right of recourse in favor of initial rail carrier against connecting rail carriers was necessary (*Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186), but a right of recourse in favor of forwarders against rail carriers was not.

Finally, the purpose of the enactment of the Forwarder Act was not, as the Court below seemed to think, to correct any unfavorable condition between the forwarder's shipper and the railroads, for there was no condition needing correction. As has been pointed out the Act was primarily intended to prevent the securing by forwarders of preferential treatment from regulated common carriers, and to regulate the forwarder's charges.

Only by such a construction can Parts I and IV of the Interstate Commerce Act, with their provisions relating to responsibility and liability and their separate rate structures be found to be in harmony.

This view is also in harmony with the limitation in § 1013 of the applicability of §§ 20(11) and (12) "'to the case of service subject to this Part.'" A statutory right of recourse by one forwarder against another was necessary, but the rights of the forwarder-shipper, against the rail carrier under the latter's bill of lading existed at the time of the passage of Part IV and concededly were not affected thereby.

POINT IV

Even if respondent be deemed "initial carrier" as to a railroad and to have a right-over under Section 20(12), such right-over is regulated, modified and limited by agreement, i.e. Section 2(b) of the bill of lading issued to respondent.

An inescapable fact in this case is that respondent, by consolidating numerous small package shipments and shipping them in a carload lot, gets the benefit of the low carload rates provided for in the tariffs of the rail carrier (R. 35, 36). Were each of the individual shipments shipped at the rail carriers less-than-carload rate respondent could not do business at all, much less do business at a profit.

Can it be that respondent can secure, for its own account, the benefit of these low carload freight charges and, at the same time, repudiate the Uniform Rail Bill of Lading contract incorporated in the classification and hitherto held to be an integral part of the rate structure of rail carriers regulated under Part I of the Act?

It is submitted, as a separate and independent argument that, even if the rail bill of lading be held to be void as to the forwarder's shipper, and even if the forwarder be held to be the initial or receiving carrier, nevertheless, the rail bill of lading can still be held valid and binding upon the forwarder as a contract between the forwarder, as initial or receiving carrier (or transportation company) and its "connecting" rail carriers.

As such a contract it can validly operate to regulate, limit or modify any right of subrogation or of recourse found to have been vested in the forwarder under § 1013. In other words, treating the forwarder as a carrier, there is nothing in the statute or common law, to prevent one carrier from making a contract with other carriers regulating and modifying their liability, *inter sese*.

The first part of the Carmack Amendment (Section 20(11)) contains a familiar provision prohibiting the carrier from limiting its liabilty by receipt or bill of lading issued to the shipper. But the second part of that amendment (Section 20(12)), which gives the initial carrier a right of recourse against subsequent carriers, contains no such provision.

Railroad carriers subject to Part I have for many years limited and modified the right-over provided by § 20(12) by promulgating a set of rules for the settlement, prorating and reimbursement for claim payments made by the initial or delivering carrier pursuant to 20(11). These rules are commonly known as Freight Claim Rules. Such rules are essential to make 20(12) workable in practice. Without them there would be chaos in adjustment of freight

claim loss and damage. These Rules in some instances go far beyond the liabilities of railroad carriers *inter sese* under 20(12). For instance, concealed damage and loss, and damage unlocated as to a particular railroad, where there are several participating in a movement, is proratable over all the carriers; but under 20(12) the railroad making the payment could only recover from the railroad responsible, a well-nigh impossible task.

The existence for many years of the Freight Claim Rules is thus evidence that the right-over under (§ 20(12)) can be modified, as between themselves, by the initial and other carriers. This plaintiff is not a party to such rules, but if it has a right-over, a right of subrogation, such right is none the less modified by another contract between plaintiff and the rail carriers. That other contract is the bill of lading issued by the first rail "connecting" carrier to respondent-forwarder, assumed to be the "receiving" carrier. The consideration for the contract is the carload rate which the forwarder pays the rail carrier, and the further consideration of a further reduced rate applicable to shipments subject to the terms of such contract (R. 35).

It is submitted that this bill of lading contract can and should be given effect as a contract between the forwarder as receiving carrier, or receiving transportation company, and the rail "connecting" carriers, and the effect is to regulate and modify the statutory right of recourse or subrogation claimed to be granted the forwarder under § 20(12) as supposedly incorporated into Part IV by § 1013.

That contract contains a claim clause and the forwarder must comply with such clause before it can exercise any rights of recourse or of subrogation against the rail carriers.

The foregoing contention is the subject of a separate and independent defense, by way of confession and avoidance, set up in petitioners' answers (R. 22, 40). The District Court having found in favor of petitioners on the points previously discussed, did not pass on this contention. The Court below, however, in the last paragraph of its opinion (R. 129), rejected it.

It is difficult to comprehend the Court's decision on this point. Petitioners suggest that the Court did not grasp petitioners' position that the rail bill of lading, even if invalid as to the forwarder's shipper, could be treated as a contract between the initial and connecting carriers. Certainly the Court did not appreciate this point when it suggested, in the last sentence of its opinion, that notice by the shipper to the forwarder under the forwarder's bill of lading would be compliance by the forwarder with the requirement of notice contained in a different bill of lading contract between the forwarder and the rail carrier.

It is respectfully submitted that the Court below erred in rejecting this contention.

POINT V

The writ of certiorari sought in the annexed petition should be granted.

Respectfully submitted,

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